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DEPARTMENT OF NATURAL RESOURCES

Division of Water Rights

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Richard Hall
Stoel Rives LLP
201 S. Main St, Suite 1100
Salt Lake City, Utah 84111

re: Distribution of water on Burnt Fork

Dear Mr. Hall:

This letter responds to your letter of February 11, 2004.

As you may be aware, the management and distribution of water rights in an arid state like Utah is complex and must be founded upon a high degree of cooperation among and between water users. This is particularly true near state lines and when water users hold both primary water rights and irrigation company shares. Water commissioners are sometimes employed to assist in water distribution. Usually, such distribution goes smoothly. Sometimes disagreements among water users arise regarding water rights and water delivery. This is especially true during droughts. Often disagreements are founded upon an incomplete understanding of water law or mis-perception of the facts of a particular situation.

For several years Wyoming and Utah have appointed a joint water commissioner for the Henry's Fork System. Each year, a meeting is held with water users and representatives from the State Engineer's Offices of both states. The last such meeting was held February 10, 2004. There water users, though disappointed in the quantity of water Mother Nature has provided lately, were generally satisfied with the regulation and delivery of water this last year.

Apparently, your clients are among the minority of individuals in the Burnt Fork area not pleased with last year's water distribution. Their concerns seem to revolve around three issues: (1) delivery of water under their recently approved Utah Water Right Number 41-3445; (2) storage in Hoop Lake Reservoir; and (3) the effect delivery of Utah water rights has on their Wyoming water rights.

While I am pleased to offer a few thoughts on these matters, at the outset you should understand three things: (1) Hoop Lake Reservoir and Irrigation Company owns the water right under which water is stored in Hoop Lake – thus, if there is a concern involving distribution of water by the company, individual shareholders should resolve that with the company and if there is a concern regarding the company's water right, such a concern should be expressed by the company, not by individual shareholders; (2) the effect delivery of Utah water rights has on Wyoming water rights is a matter between the two states – on the Henry's Fork System, in other

words, Utah answers to its water right holders and to Wyoming, and Wyoming answers to its water right holders and to Utah; and (3) while the state engineer makes an effort to resolve or assist in the resolution of the water distribution issues that are brought to his attention, he does not have the resources to resolve every water distribution dispute that arises in the state. Therefore, he must use judgment in determining the priority of distribution issues and those that merit the allocation of state resources. The Utah Supreme Court has said:

The State Engineer is charged with some sort of obligation to control the distribution of decreed water rights, but not to referee isolated instances of abuses between [water users] as to who did what in relation to whom, – a matter for the courts to hear in order to assess damages, if any might be found. *Jennings v. Graham*, 300 P.2d 123, 125 (Utah 1964).

There are instances when water users must look to the other avenues available to them to resolve disputes regarding water distribution.

Water Right 41-3445, the only Utah water right owned by your client, was approved June 6, 2003. The water right has a priority date of 1991 and allows the diversion of 7.7 cfs from Middle and East Forks of Beaver Creek for the irrigation of 240.00 acres located in Wyoming. The memorandum decision approving this water right said, among other things, "Delivery of water to the land under this application shall only be made if senior rights are satisfied in full, including the 'double duty' allowed under Wyoming Law, and as administered under the Henry's Fork Distribution System." Last year was a very dry year for Beaver Creek. No water was available under Water Right Number 41-3445 last year due to the combination of low flows and the late priority of the right. Additionally, the confluence of West Fork of Beaver Creek with Beaver Creek is located in Wyoming, so the regulation and distribution of water on West Fork can have no effect whatsoever on the regulation and distribution of water under Utah water rights on either Middle Fork or East Fork of Beaver Creek. Therefore, it is difficult to understand what injury, even indirect injury, might have occurred to your client's Utah water right last year because of distribution practices on West Fork of Beaver Creek.

Water Right Number 41-1425, owned by Hoop Lake Reservoir and Irrigation Company, has a priority date of 1939 and allows the storage of 3,925 acre-feet of water diverted from Thompson Creek and 101.5 acre feet diverted from East Fork of Beaver Creek. Water may be diverted for storage year round from Thompson Creek after senior downstream appropriators are satisfied. The irrigation season as set forth in the proposed determination of water rights for the area (Green River, Western Division and Burnt Fork Division) is from May 15 through October 15 except the proposed determination says:

"The period of irrigation use set forth herein allows use of water at least one month in advance and one month following the average frost-free period of each year, but the State Engineer, or his duly appointed water commissioner, may vary this period of use, when necessary, to insure the most beneficial use of water; but this variance shall not establish any right as against storage, or other beneficial uses, either present or future."

Last year, the commissioner started regulation on Burnt Fork on May 18, 2004, and the Thompson Creek diversion for Hoop Lake was not shut off until June 7, 2004. It does not appear early irrigation caused any injury to your client.

Hoop Lake has had less storage the last few years because Utah is experiencing a severe drought and stream flows have been greatly reduced. Storage in Island Lake has no impact on the storage in Hoop Lake; being on separate tributaries to Burnt Fork, there is no direct connection between the two reservoirs. However, even if there were a connection, the priority date of the water rights would govern. The 1982 Donald Norseth memo you referenced states, "Priority of water rights would prevail in this problem with the later priority cut first." The Island Lake water right has a priority date of 1926, which is senior to the 1939 priority of the Hoop Lake water right.

Throughout the state the conflict between direct flow water rights and storage water rights exists. It is generally understood that the storage season starts after the irrigation season is over. Any storage that may occur in the late irrigation season due to a reduction in direct flow irrigation usage is a benefit, but establishes no right. There is no basis for a complaint that water users irrigated until the end of the irrigation season during a dry year with a warm fall. Also, in addition to irrigation rights, year round stockwatering rights allow the canals to divert a small amount of water when not irrigating.

The issue regarding the effect delivery of Utah water rights has on your client's Wyoming water rights arises because of the difference in the definition of irrigation duty between the two states. Wyoming primarily uses a duty of 1.0 cfs per seventy acres while Utah uses 3.0 acre-feet per acre. The 3.0 acre-feet per acre duty was not established to limit beneficial use but to define the beneficial use of water. The proposed determination states:

"In the instance of irrigation, the field headgate requirement of the land has been considered to be 3.0 acre-feet per acre per calendar year, regardless of the source of supply. ... Transmission allowances for canals in excess of one mile in length is not included in this proposed determination, but is under consideration and investigation by the office of the State Engineer and will hereafter be the subject of the supplemental report to this Court."

The State Engineer's office has not determined the canal conveyance losses described above. As a result, the allowable irrigation duty at the diversion from the stream has not been determined, but it is 3.0 acre-feet per acre or more. Not every tributary to Burnt Fork has been included within this distribution system at this time and therefore, many are not regulated by the water commissioner. If the decision were made to regulate every source of water on the Burnt Fork Drainage, it would entail either the installation of real time measurement stations for every diversion and farm headgate at a cost of approximately \$5,000 each or the appointment of multiple water commissioners. The related costs of doing so would be passed on the water users in the distribution system.

There is also another issue related to the strict enforcement of the 3.0 acre-foot per acre duty. The duty applies not only to lands irrigated in Utah but also to lands irrigated in Wyoming with Utah water rights, whether based on direct flow or storage. Enforcement of this duty would limit any lands irrigated under a Utah water right to 3.0 acre-feet per acre from all sources including water from reservoir storage and water received under Wyoming water rights. The state of Utah has not worked out an agreement with the state of Wyoming for this type of regulation on lands irrigated in Wyoming.


The commissioner reports the flows from the Indian Springs are greater than the flows diverted into the Highline Canal.

Neither this office nor the water commissioner have directed the water users on Burnt Fork to increase their diversion flow rates to account for conveyance losses. This allegation evidently results from a misunderstanding regarding the 3.0 acre-feet per acre duty. It was explained that to deliver 3.0 acre-feet at the farm headgate would require diverting more than 3.0 acre-feet from the source. This refers to the total quantity of water that may be diverted and not the allowable rate at which the water may be diverted.

You also raised the issue of beaver dams obstructing the flow of the West Fork of Beaver Creek. The Utah State Engineer does not have the authority to order the removal of beaver dams. In Utah, removal of beaver dams from a natural channel requires a stream channel alteration permit and the approval of the landowner.

We regret that your client feels its rights have been impaired. However, we do not believe the evidence supports the allegations made. We will continue to work with the Wyoming State Engineers Office to ensure the equitable distribution of water on the Henry's Fork Distribution System in accordance with Utah State law and the Upper Colorado River Compact. To this end we will continue to attempt to improve the system as we have the time and resources, and address issues as they come to our attention.

Respectfully,



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State Engineer

JDO:LHS:RWL

cc: Clyde Hanks
Jade Henderson
Tod Kovolo